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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHT NO. G192529-40A BY WRIGHT)
RANCH, INC.)

FINAL ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 15, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Application for Change of Appropriation Water Right No. G192529-40A by Wright Ranch, Inc., is denied without prejudice.

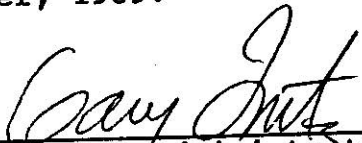
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

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petition in the appropriate court within 30 days after service of the Final Order.

Dated this 18 day of October, 1989.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59624-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, at their address or addresses this 19th day of October, 1989, as follows:


Wright Ranch, Inc.
Moore, MT 59464

John R. Christensen
Attorney at Law
P.O. Box 556
Stanford, MT 59479

David Baird
Rural Route
Judith Gap, MT 59453

Opal A. Rung
912 West Washington
Lewistown, MT 59457

Sam Rodriguez
Lewistown Field Manager
P.O. Box 438
Lewistown, MT 59457



Irene V. LaBare
Legal Secretary

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION)	PROPOSAL FOR DECISION
WATER RIGHT NO. G192529-40A BY)	
WRIGHT RANCH, INC.)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 6, 1989, in Lewistown, Montana.

Applicant Wright Ranch, Inc., appeared by and through Mark Wright.

Objector Opal Rung appeared in person and was represented by counsel, James Hubble.

Objector David Baird appeared in person and also as a witness for Objector Rung.

EXHIBITS

The Applicant offered no exhibits for inclusion in the record.

The Objectors offered two exhibits for inclusion in the record.

Objector's Exhibit 1 is a copy of a page from the Wheatland County Water Resources Survey published in July, 1949. On it are shown Rung and Baird's property. Also, indicated by a circle with an "A" next to it is Baird's center pivot as drawn in by Baird.

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Objector's Exhibit 2 is a letter from Mark Wright "To Whom It May Concern" with a short explanation of the proposed change.

Objector's Exhibits 1 and 2 were entered into the record without objection.

The Department of Natural Resources and Conservation (hereafter, the "Department") file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this case.

2. Application for Change of Appropriation Water Right No. G192529-40A was duly filed with the Department of Natural Resources and Conservation on June 14, 1988, at 2:45 p.m.

3. The pertinent portions of the Application were published on October 20, 1988, in the Times Clarion, a newspaper of general circulation in the area of the source.

4. The Applicant proposes to change the point of diversion and place of use of Claimed Water Rights Nos. W192529-40A, W192530-40A, W192531-40A, and W192532-40A, the source for which is surface water from Neill Creek, a tributary of Blake Creek. The claims list the source as Smythe Creek but other sources, including Objector's Exhibit 1, indicate the correct source name is Neill Creek.

5. Statement of Claim for Existing Water Right
No. W192529-40A claims 320 miners inches up to 2434 acre-feet of water per year to be used to irrigate 389 acres in Sections 9, 10, 15, 16, and 21, all in Township 11 North, Range 17 East, Fergus County, Montana. The claimed priority date is April 15, 1900.

Claim No. W192530-40A claims 100 miners inches up to 2434 acre-feet per year to be used to irrigate the same 389 acres as W192529-40A with a claimed priority date of June, 1893.

Claim No. W192531-40A claims 200 miners inches up to 2434 acre-feet per year to be used on the same 389 acres as W192529-40A and W192530-40A with a claimed priority date of May 1, 1900.

Claim No. W192532-40A claims 200 miners inches up to 2434 acre-feet per year to be used on the same 389 acres as W192529-40A, W192530-40A, and W192531-40A with a claimed priority date of June 15, 1902.

The water covered by these claimed rights is diverted by a dam across Neill Creek located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, Township 11 North, Range 17 East. The water runs from the earthen spillway of the dam and is then spread by ditches over the place of use. There is no control on the dam to regulate the water. (Testimony of Mark Wright and Department file.)

6. The Applicant proposes to move the point of diversion of the four claimed water rights downstream on Neill Creek to two points in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, Township 11 North, Range 17 East. The Applicant also proposes to change the place of use from irrigating 54.61 acres in Sections 15 and 16, Township 11 North, Range 17 East to 50.7 acres located as follows: 18.9 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$; 17.7 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$; and 14.1 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, all in Section 21, Township 11 North, Range 17 East. (Department file.)

7. The Applicant proposes to divert the water at the new diversion points by restricting the flow of Neill Creek to raise the level of the water. The Applicant has no plans how this will be done. It could be by building a structure of wood, steel, concrete, or dirt. (Testimony of Wright.) The Applicant also indicated that no specific sites have been selected for the diversions and that the amount of water to be diverted has not been determined.

8. The Applicant proposes to use only the high flows of Neill Creek and to allow low flows to pass on downstream.

9. The land which has been irrigated was leased by the Applicant but the Applicant has lost the lease so can no longer utilize the right at that location. (Testimony of Wright.)

10. Neill Creek is often dry at the Applicant's old point of diversion. There are springs in the creek between the Applicant's old point of diversion and the proposed point of diversion. (Testimony of Wright.)

11. The Applicant's old diversion would be removed if the change application is approved. (Testimony of Wright.)

12. The Applicant owns the land where the proposed place of use would be located. (Testimony of Wright.)

13. Objector Baird has claimed a senior water right from Neill Creek for irrigation and stockwater downstream from the proposed change. The claimed irrigation right is used for subirrigation and a center pivot system. (Department file, Testimony of Baird and Wright.) Objector Rung has a stockwater right from Neill Creek downstream from the proposed change but upstream from Objector Baird. This stock right is junior in priority to the Applicant's water rights. (Testimony of Rung and Wright.) Objector Rung said that high water helps saturate the land along the creek and provides a benefit but no water right was identified for this use.

14. There are times when Neill Creek on the Objector's land is too low to irrigate from but it has never been completely dry to the Objector's knowledge. (Testimony of Baird and Rung.)

15. Both Objectors expressed concern that if the Applicant's land ever changed hands, that the new owner might operate the system in such a manner as to seriously affect their rights.

16. Objector Baird expressed concern that there may be more water available for appropriation by the Applicant at the proposed diversion than at the present diversion. Baird felt this could cause some possible adverse affect on his ability to satisfy his water rights.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. Under Section 85-2-402(2), MCA, the Department must issue a Change Authorization if the Applicant proves by substantial credible evidence that the following criteria are met:

a. The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

b. The proposed means of diversion, construction, and operation of the appropriation works are adequate.

c. The proposed use is a beneficial use.

d. The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use of water, irrigation, is a beneficial use of water. (See Section 85-2-102(2)(a), MCA.)

5. The Applicant has a possessory interest in the property where the water is to be put to use. (See Finding of Fact 12.)

6. The Applicant has failed to show that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Finding of Fact 7.)

The Applicant has no plans developed on how the diversion works would be constructed or operated. The Applicant's testimony indicated that it has not yet been determined what type of material would be used to construct the diversion. There was no evidence presented to show how the new irrigation diversion and system would be developed to ensure that a greater flow rate or volume of water would not be diverted at the proposed diversion than has been utilized in the past.

7. The Applicant has also failed to show that the proposed change will not adversely affect the water rights of other persons. The Applicant presented no evidence other than a statement saying that he would not affect the rights of the downstream appropriators. Since the Applicant appears to have no

specific plans of how the new diversion works would be constructed or even its precise location, it would be very difficult for him to show that there would be no adverse affect on another person's water rights.

The Applicant testified that there are springs in the creek between the old point of diversion and the proposed diversion points. (See Finding of Fact 10.) This would indicate that there is more water available for appropriation by the Applicant at the proposed points of diversion than at the present diversion point and therefore there could be an adverse affect on downstream appropriators unless the diversion was constructed and operated to alleviate any impacts.

PROPOSED ORDER

Application for Change of Appropriation Water Right No. G192529-40A by Wright Ranch, Inc. is denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed

and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 15th day of September, 1989.

Walter L. Rolf
Walter L. Rolf, Hearing Examiner
Department of Natural
Resources and Conservation
P.O. Box 276
Miles City, Montana 59301
(406) 232-6359

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, at their address or addresses this 15th day of September, 1989, as follows:

Wright Ranch, Inc.
Moore, MT 59464

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Legal Secretary